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No. 05-988

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,

Petitioner,

v.

EARL F. ARAKAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this already long-delayed case, 4 years old and still enmeshed in litigating the threshold issue of standing, should be "held" further pending this Court's decision in *Daimler-Chrysler v. Cuno*.

2. Whether the time has come for this Court, respondents' last hope for a just and speedy adjudication, to take charge, resolve the standing questions and allow this important case to move forward to judgment on the merits.

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INTRODUCTION

Respondents are fourteen individual citizens of Hawaii and the United States of America who, as state taxpayers and beneficiaries of Hawaii's ceded lands trust, came to federal court four years ago, seeking relief from a broad and patently offensive regime of racial discrimination and breach of fiduciary duty by the State of Hawaii and its officials.

Respondents have just filed a conditional cross-petition for certiorari and do not oppose, indeed they welcome, this Court's review of *all* the "standing" issues in this case.

They oppose the granting of a writ of certiorari *only* to the petitioner and also oppose the request that this Court *hold* the petition(s) for certiorari in this case "pending this Court's ruling in the *Cuno* case." (See petition for certiorari, conclusion at 20, 21.)

Mindful of the admonition in Sup. Ct. Rule 15.2, respondents point out and respond to perceived misstatements in the petition.

RESPONSE TO PERCEIVED MISSTATEMENTS

A. Respondents have standing, not "simply because they pay taxes to the state," but because they are denied equal treatment which causes injury to their pocketbooks.

The petition casts the "question presented" as whether state taxpayers have standing "simply because they pay taxes to the state."

Respondents never made such a claim. Rather, their complaint, as taxpayers, is that the state does not treat all taxpayers equally: It singles out respondents and other taxpayers similarly situated and denies them the benefit of the part of their taxes used exclusively for those of the favored racial ancestry. (See Complaint, Cross-Pet. App. 71, 101 and 104.) The aggregate injury to the state treasury and to the pocketbooks of respondents, and other taxpayers similarly situated, to date is over $1 billion and is ongoing and escalating. (Cross-Pet. App. 16, 17 & 19.)

Neither the trial court nor the court of appeals upheld respondents' standing as taxpayers "simply because they pay taxes to the state." Both cited the Ninth Circuit's leading case on state taxpayer standing, *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), which relied on this Court's well-established rule in *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. (Internal citations omitted.)
>
> . . .
>
> The taxpayer's action can meet this test but only when it is a good-faith pocketbook action.

The question which petitioner seems to be asking, at 15, 16 of the petition, is whether, in light of Justice Kennedy's opinion in *ASARCO v. Kadish*, 490 U.S. 605, 613-14 (1989), *Doremus* is still good law. If so, that is a puzzling argument because the words of Justice Kennedy cited in

the petition at 11, confirm that *Doremus* is alive and well and that state taxpayers who show a "direct injury," pecuniary or otherwise, do indeed have standing in federal court.

However petitioner chooses to phrase the question, respondents welcome this Court's review, along with the other "standing" questions, of the state taxpayer claim as set out in the Complaint to judge whether it alleges a "good-faith pocketbook" injury. Consider, for example, these allegations of the complaint,

> ¶62.b. **Appropriations for OHA[1] harm Plaintiffs as taxpayers**. . . . Although each Plaintiff's tax burden is increased by the appropriations to OHA, and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA, each Plaintiff is denied any benefit of the portions set aside for "native Hawaiians" solely because of his or her ancestry, i.e., none of the Plaintiffs have the required one-half part of the favored racial ancestry. (Cross-Pet. App. 104.)

See also Complaint ¶58, particularly d., for allegations of specific injury suffered by each plaintiff, as a taxpayer, resulting from implementation of the HHCA/DHHL laws. (Cross-Pet. App. 98-101.)

As this Court teaches in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), plaintiffs must allege a distinct and palpable injury even if it is shared by a large class of other

---

[1] The State of Hawaii's Office of Affairs, established by HRS Chapter 10 to serve the interests of Hawaiians and native Hawaiians. These classifications have been held by the U.S. Supreme Court to be racial. *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000).

possible litigants, but so long as this requirement is satisfied, may have standing to seek relief on the basis of the legal rights and interests of others and, indeed, may invoke the public interest in support of their claim.

B. Following annexation, Hawaiians' numbers increased steadily and they achieved political success.

The petition asserts a litany of suffering leading to the enactment of HHCA in 1921, at page 4, paragraph 2, including, "drastic reductions in their native population" and "political disempowerment."

It is true and sad that the Hawaiian population in Hawaii declined precipitously during the years of the Kingdom, but the historic fact is that it then reversed and rose steadily after annexation in 1898. (Schmitt, *Demographic Statistics of Hawaii, 1778-1965*, Cross-Pet. App. 7.) One of the benefits to Hawaiians after annexation was voting power they had never had under the monarchy. All of them became U.S. citizens and the male members of the Hawaiian population, like all other male citizens of America, gained the right to vote. Up until 1922, Hawaiians, representing the majority of voters, controlled the Hawaii Legislature. They continued until 1938 to be the largest bloc of voters. As late as 1927, Hawaiians held 46 percent of appointed executive positions in the territorial government and 55 percent of clerical and other government jobs. More than half of the judgeships and elective offices were filled by people of Hawaiian ancestry. *Hawaiian Sovereignty: Do The Facts Matter?* Twigg-Smith, 1998 at 131, 132.

C. Admission Act §5(f) says "one or more". It does not require any additional special treatment for native Hawaiians or for any one of the other four purposes.

The petition asserts, at page 4, paragraph 3, that in 1959 Congress directed that the ceded lands be held in a public trust "for five purposes, including 'the betterment of the condition of native Hawaiians'", citing §5(f) of the Admission Act. However §5(f) directed that the ceded lands be used for "one or more" of the five purposes. Other than the Hawaiian Homes Commission Act and the 200,000 acres of "available lands" under §4, nothing in the Admission Act required any of the ceded lands or their revenues to be used for "native Hawaiians" or for any one of the other four purposes.

D. It is doubtful that the people of Hawaii adopted the 1978 OHA amendments.

At page 5, the petition says, "In 1978 the people of Hawaii amended the Hawaii Constitution to create an Office of Hawaiian Affairs (OHA) whose mission was to better the conditions of Native Hawaiians and native Hawaiians."

As specified in the Complaint, ¶32 (Cross-Pet. App. 90) which must be accepted as true for purposes of standing and, in any event, is based on official election results, the 1978 votes were not tallied legally; 18,833 voters were disenfranchised; and it is doubtful that the required majority of the voters ratified the OHA amendments. (The time for election contests has long-passed, but it is nevertheless inaccurate to claim that the OHA amendments were adopted by the people of Hawaii.)

E. HHCA and the OHA laws deny to respondents absolutely and on exclusively racial grounds, the opportunity to seek and obtain valuable economic and educational benefits available through those agencies. They are able and ready to apply if the state should cease using the racial classification.

The petition asserts at page 5 that plaintiffs did not allege that any of them applied for, or otherwise sought, or were even interested in, participating in these programs; at page 10, that they do not allege that they even desire, much less seek, any of the benefits; and again at page 19, that they don't seek the benefits.

First, this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) instructs that "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'").

Second, the HHCA and the OHA laws deny plaintiffs the opportunity to apply and compete for benefits on an equal basis. The racial barrier is manifest on the face of the statute and it denies to them absolutely, without any room for waiver or individualized decision-making by state officials, the equal protection of the laws and causes each of them an injury in fact.

Moreover, regardless of the fact that they have not actually applied for particular programs, each of them is "able and ready" to apply for benefits should the State cease to use race, i.e., excluding anyone who is not "native Hawaiian" or "Hawaiian". See, for example, the

Declaration of Donna Malia Scaff dated December 3, 2003 filed in the trial court with docket 326. (Respondent App. 1, *infra*.)

See also *Gratz v. Bollinger*, 123 S.Ct. 2411, 2423 (2003) "Hamacher demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions."

REASONS FOR OPPOSING CERTIORARI ONLY FOR THE ONE "STANDING" ISSUE

Further delays now would be particularly unfair to respondents who, as plaintiffs, endured 22 months of delays in the trial court. During all those months, plaintiffs were prevented from moving for, and being heard on, summary judgment on the merits while the trial court: considered and reconsidered standing issues raised by defendants; considered and reconsidered bifurcation issues raised by defendants; set a protracted hearing schedule over plaintiffs' objection; then, after exhaustive briefing, *sua sponte* continued the first round hearing over plaintiffs' objection; then *sua sponte* continued it again over plaintiffs' objection, this time ordering that the first round motions were "deemed withdrawn without prejudice subject to being refiled"; let the United States out, then brought it back in, then let it out again; struck plaintiffs' motion for partial summary judgment; and declined to issue an appealable standing order. Finally, 22 months after the suit was filed, the trial court granted the motion to dismiss on "political question" grounds, substantially

the same motion the court had denied only 2 months and 4 days after the case was filed. (This is spelled out in itemized detail in Appellants' Opening Brief filed in the Ninth Circuit June 7, 2004, at 55-66, "V. TWENTY TWO MONTHS OF DELAY.")

Piecemeal review of just the one "standing" issue raised by the petitioner would not only add further delay to this already unconscionably-delayed case, but might even foreclose indefinitely the practical ability of anyone in Hawaii to end the existing regime of invidious discrimination by the Hawaii state government and its officials.

Justice in this case has been denied for 4 years. Respondents pray that this Court will take charge, grant a writ of certiorari to both the petitioner and the respondents/cross-petitioners; resolve all the standing questions; and allow this important case to move forward to judgment on the merits.

REASONS FOR NOT "HOLDING" THE PETITION(S)

Daimler-Chrysler v. Cuno, Nos. 04-1407 and 04-1724, was argued before this Court March 1, 2006 and may be decided in the ordinary course within the time frame that this Court will decide whether to grant certiorari in this case.

It is conceivable that the decision there could provide some guidance here. For example, if this Court upholds Ms. Cuno's standing as a state taxpayer, it would indicate that respondents' state taxpayer standing should, even more so, be upheld and without the narrow restriction.

But, contrary to the argument of petitioner, dismissal of *Cuno* for lack of jurisdiction would not dispose of this case. As discussed earlier, respondents allege not a grievance shared by all state taxpayers, but the genuine pocketbook injury each of them suffers because she or he is singled out for exclusion from the benefits of her or his taxes solely because of her or his race.

Finally, and perhaps most important of all, respondents present a claim as trust beneficiaries and Ms. Cuno does not. The trust beneficiary claim is the major focus of respondents' conditional cross-petition for certiorari. The dismissal of the trust claim for lack of standing has repercussions not only for Hawaii's management of its 1.4 million acre ceded lands trust but for public trusts, charitable trusts and even private trusts across the United States and, perhaps throughout the world. The trial court's casual disregard of a trustee's duty of impartiality and duty not to comply with illegal trust terms, radically reduces the protection of beneficiaries basic to the law of trusts. The "heads-trustees-win, tails-beneficiaries-lose" reasoning by the court of appeals (Beneficiaries cannot sue the U.S. because it is not named as co-trustee; but since the U.S. retains power over the operation of the trust, it is an indispensable party; so the beneficiaries cannot sue the present trustee either. See Conditional Cross-Petition at 22.) is breathtaking in its rejection of the foundation of trust law, the trustee's duty of strict loyalty to the beneficiary. The existing decision in this case that trust beneficiaries *cannot even come into court* to seek equitable relief where the trustee blatantly violates its fiduciary duty, undermines trusts everywhere. This is a decision that justifies this Court's review, and soon.

CONCLUSION

The Court should grant both the petition and conditional cross-petition for writs of certiorari.

Respectfully submitted,

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March 7, 2006

APPENDIX TO BRIEF IN OPPOSITION

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Declaration of Plaintiff Donna Malia Scaff filed December 3, 2003 in the District Court with Docket 326 ..... App. 1

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

EARL F. ARAKAKI, et al.,	) CIVIL NO. 02-00139 SOM/KSC
Plaintiffs	) DECLARATION OF PLAINTIFF DONNA MALIA SCAFF
v.	) IN RESPONSE TO ORDER
LINDA LINGLE, et al.,	) TO SHOW CAUSE DATED
Defendants.	) NOVEMBER 24, 2003

DECLARATION OF PLAINTIFF DONNA MALIA SCAFF IN RESPONSE TO ORDER TO SHOW CAUSE DATED NOVEMBER 21, 2003

1. I am a citizen, resident, inhabitant, registered voter, and taxpayer of the State of Hawai'i and of the United States and I am over the age of 18.

2. I am an American of Hawaiian ancestry (37.5%) and Chinese, German and Okinawan ancestry (62.5%). I was born and raised on Molokai and have lived in Hawaii all my life.

3. In this declaration, I use the term "Hawaiian" as it is defined in HRS § 10-2: any descendant of the people inhabiting the Hawaiian Islands in 1778. Under that definition, I am a "Hawaiian." I also use the term "native Hawaiian" as it is defined in HRS § 10-2 and the Hawaiian Homes Commission Act: any descendant of not less than one half part of the races inhabiting the Hawaiian Islands previous to 1778. Under that definition, I am not a "native Hawaiian."

4. **Appropriations for OHA for "native Hawaiians" harm me as a taxpayer.** Part of the State of Hawaii's tax revenues (including taxes I pay to the State of Hawaii) are appropriated to the Office of Hawaiian Affairs (OHA) for native Hawaiians and part also goes to pay principal and interest on bonds that generated funds that have been appropriated to OHA for native Hawaiians and part also goes to finance appropriations to OHA as a pro rata portion of funds derived from the public land trust for the betterment of conditions of native Hawaiians. The OHA laws require the OHA trustees to use funds appropriated for the betterment of conditions of native Hawaiians solely for the benefit of the racial class of native Hawaiians. If the State tax revenues (including taxes I pay) were not diverted to OHA for native Hawaiians, my taxes could be reduced or funding for programs that I could qualify for could be increased. Although my tax burden is increased by the appropriations to OHA for native Hawaiians and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA for native Hawaiians, I am denied any benefit of those appropriations solely because of my ancestry, i.e., I do not have the required one-half part of the favored racial ancestry. I am injured in that I am denied the equal protection of the laws and I am forced to pay taxes for unconstitutional racially discriminatory programs which exclude me as a beneficiary.

5. **Appropriations to or for OHA for "native Hawaiians", and OHA's retention and use of public funds only for "native Hawaiians", also injure me as a citizen.** The OHA laws deny me the opportunity to apply and compete for benefits from the funds held by OHA for native Hawaiians on an equal basis. The imposition of this

racial barrier denies to me the equal protection of the laws and causes me an injury in fact. I am "able and ready" to apply for benefits from those funds should the State or OHA cease to use race, i.e., excluding anyone who is not "native Hawaiian", with respect to the use of those funds.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of December, 2003, Honolulu, Hawaii.

/s/ Donna Malia Scaff
DONNA MALIA SCAFF